

STATE OF MICHIGAN
COURT OF APPEALS

DOMINIC S. QUINONES,

Plaintiff-Appellant,

v

AMERICAN COMMERCIAL INDUSTRIES,
INC., d/b/a CARRON & COMPANY, and ACI-
CARRON, a division of AMERICAN
COMMERCIAL INDUSTRIES, INC., d/b/a ACI-
CARRON,

Defendants-Appellees.

UNPUBLISHED

April 23, 2002

No. 226673

Wayne Circuit Court

LC No. 99-903777-CL

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition on plaintiff's age discrimination claim. We affirm.

I. Facts and Procedural History

Carron & Company hired plaintiff as a bookkeeper and accountant in 1973 and promoted him to the position of controller in 1982. As controller, plaintiff continued to perform his bookkeeping duties and assumed responsibility for arranging bank loans and collecting payments for Ford Motor Company work. On December 16, 1996, American Commercial Industries, Inc. (ACI) acquired Carron & Company and renamed it ACI-Carron, a division of ACI. Plaintiff continued to work as the company's controller until March 21, 1997, when he was terminated at the age of fifty-eight.

On February 9, 1999, plaintiff filed a complaint and alleged that defendants terminated him because of his age in violation of MCL 37.2202(1)(a). On January 18, 2000, defendants filed a motion for summary disposition under MCR 2.116(C)(10), and argued that there is no genuine issue of material fact regarding plaintiff's lack of qualifications for the ACI-Carron controller position and that plaintiff could present no evidence to rebut defendants' nondiscriminatory reasons for plaintiff's termination. Defendants further asserted that plaintiff could not present any evidence that age was a factor in the company's decision to terminate him. In response, plaintiff argued that he was qualified for the ACI-Carron position and that

defendants' proffered reasons for his termination were false and a mere pretext for age discrimination.

Following oral argument, the trial court granted defendants' motion on April 5, 2000. The trial court ruled that plaintiff failed to present a genuine issue of material fact regarding his qualifications for the position and that, after defendants came forward with legitimate nondiscriminatory reasons for his termination, plaintiff failed to present evidence that defendants' reasons were a pretext for age discrimination.

II. Analysis

A. Standard of Review and Applicable Law

We review a trial court's grant of summary disposition under MCR 2.116(C)(10) *de novo*. *Michalski v Reuven Bar Levav*, 463 Mich 723, 729; 625 NW2d 754 (2001). As our Supreme Court recently explained in *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001):

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law.

Plaintiff brought this age discrimination claim under MCL 37.2202(1)(a) of Michigan's Civil Rights Act (CRA), which provides, in relevant part:

An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age

Because plaintiff did not present evidence of direct discrimination, to survive summary disposition, Michigan law requires plaintiff to present his case within the framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle*, *supra* at 462-463. As our Supreme Court reiterated in *Hazle*:

Under *McDonnell Douglas*, a plaintiff must first offer a "prima facie case" of discrimination. Here, plaintiff was required to present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. [*Id.* at 463.]

Once a plaintiff has established a prima facie case of discrimination, "a presumption of discrimination arises." *Id.*, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). The defendant then "has the opportunity to articulate a legitimate,

nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case.” *Hazle, supra* at 464. “If the employer makes such an articulation, the presumption created by the *McDonnell Douglas* prima facie case drops away.” *Id.* at 465. Further,

At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is “sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.” *Lytle, supra* at 176. As we first held in *Town v Michigan Bell Telephone Co*, 455 Mich 688, 698; 568 NW2d 64 (1997), and then reaffirmed in *Lytle, supra* at 175-176, a plaintiff “must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination.” [*Hazle, supra* at 465-466.]

B. Plaintiff's Prima Facie Case

Defendants do not dispute that plaintiff is a member of a protected class or that he suffered an adverse employment action because plaintiff was fifty-eight years old when ACI-Carron terminated him. However, defendants argued below, and the trial court agreed, that plaintiff failed to establish a triable issue regarding his qualifications for the controller position at ACI-Carron.

In support of their motion for summary disposition, defendants presented the affidavits of James Myers, ACI's controller, and Jan Owczarzak, ACI's finance director, both of whom interviewed plaintiff and evaluated his skills for approximately three months after the ACI buy-out. Myers and Owczarzak both observed that plaintiff had no experience performing the work required for the controller position at ACI-Carron. Specifically, the affiants noted that plaintiff was unable to analyze job costs because he was not familiar with job cost accounting techniques or monthly profitability analysis. They further found that plaintiff could not independently close the monthly or annual books or assist in the company's financial or business planning. Indeed, Owczarzak testified in his deposition that plaintiff admitted that he did not know how he would perform the tasks necessary for the controller position. While Owczarzak acknowledged that plaintiff adequately performed bookkeeping functions while at Carron & Company, he maintained that plaintiff's responsibilities in the new company, ACI-Carron, were more complex and, without significant training, were simply beyond plaintiff's capabilities.

Defendants also presented plaintiff's deposition testimony, in which he stated that, after the ACI takeover, he continued to perform his prior duties but that James Myers assumed many of the controller responsibilities for ACI-Carron as of January 1997. Plaintiff further testified that he did not have experience drafting business plans, financial projections, cost analyses, profitability studies or making cost savings recommendations.

In response to defendants' motion, plaintiff presented the affidavit of Arnold Meissner, president of Carron & Company and ACI-Carron, who described plaintiff as “a loyal, dedicated, and conscientious employee” who, until his termination in March 1997, competently performed his controller and bookkeeping duties, including “record keeping, accounting procedures, maintaining reserves, collecting receivables, closing books, and reporting costs.” Meissner

further stated that he never recommended that plaintiff be terminated. Meissner's statements conflicted with the deposition testimony of Brent Kearns, who stated that Meissner told him that plaintiff was unable perform the duties of ACI-Carron's controller and the testimony of Owczarzak and Larry O'Dowd, ACI's president and chief operating officer, who stated that Meissner recommended plaintiff's termination.

We agree with the trial court that plaintiff failed to establish a prima facie case of age discrimination because he failed to show that he was qualified for the controller position at ACI-Carron. While Meissner stated in his affidavit that he believed plaintiff performed certain bookkeeping and controller functions well, a later affidavit presented by defendants establishes that Meissner did not have the authority to evaluate plaintiff's performance after the ACI takeover. Furthermore, while Meissner listed certain duties plaintiff ably carried out, conspicuously absent from the list are those duties required for the ACI-Carron position that plaintiff did not or could not perform, including drafting business plans, financial projections, job-cost analysis, profitability studies, or cost savings recommendations. Plaintiff failed to rebut defendants' evidence that those duties were required for the ACI-Carron controller position and presented no evidence that plaintiff could perform those duties. Accordingly, plaintiff failed to establish a genuine issue of material fact regarding his qualifications for the ACI-Carron position and defendants were entitled to judgment as a matter of law. Simply put, plaintiff failed to make out a prima facie case of age discrimination.

C. Reasons for Plaintiff's Termination

Were we to find that, through Meissner's affidavit, plaintiff minimally established a prima facie case of age discrimination, defendants are nonetheless entitled to summary disposition because plaintiff failed to establish that the proffered reasons for plaintiff's termination were a mere pretext for age discrimination.

Defendants articulated two primary reasons for plaintiff's termination: (1) plaintiff's inability to perform the job of controller at ACI-Carron and (2) company downsizing following significant financial losses.

Plaintiff avers that the "multiple, conflicting" reasons defendants gave for his termination give rise to an inference that the reasons were false and that defendants terminated him because of his age. We seriously question the logic of plaintiff's contention that "multiple, conflicting" reasons imply falsehood or pretext. Often, as here, a confluence of circumstances leads to an employee's termination and, clearly, it is not uncommon for job loss to result from a combination of downsizing and an inability to perform the job.

Plaintiff also failed to present evidence that defendants' reasons were false or "that discrimination was a motivating factor" for plaintiff's termination. *Hazle, supra* at 465-466, quoting *Lytle, supra* at 175-176. As noted, ample evidence showed that plaintiff was not qualified to perform the duties of ACI-Carron's controller. Further, defendants presented evidence that, in addition to his \$90,000 annual salary, Carron & Company spent \$40,000 to \$60,000 on outside accounting services to help plaintiff close the monthly books. As defendants point out, plaintiff admitted during his deposition that the company suffered a \$1.9 million loss in 1996 and that, in his opinion, the terminations of other employees were necessary to reduce

costs. Moreover, defendants established that numerous employees, of various ages, many younger than plaintiff, were terminated at or around the same time as plaintiff.

In response, plaintiff offered no evidence to support his conclusory assertion that defendants' stated reasons for his termination must be false. Further, plaintiff's own testimony supports defendants' articulated reasons. Plaintiff acknowledged his inexperience with the duties required of an ACI-Carron controller and testified that he knew about the company's severe financial problems. Plaintiff also testified that, prior to the ACI takeover, Meissner asked him about his future plans and that, around the same time, Meissner and Kearns talked to five or six other employees who were over the age of fifty-five, but plaintiff had little to no knowledge of the substance of those discussions. However, evidence offered by plaintiff shows that numerous employees of different ages were terminated within three months after the ACI takeover. Moreover, there is no evidence that Meissner's inquiry was related to plaintiff's age or that it had any bearing on plaintiff's ultimate termination. Therefore, plaintiff failed to present evidence that defendants' explanation was false, that it was unworthy of belief or that his age was a factor in defendants' decision to terminate him.¹

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad

¹ Plaintiff's reliance on *Reeves v Sanderson Plumbing Products, Inc.*, 530 US 133; 120 S Ct 2097; 147 L Ed 2d 105 (2000) is misplaced. As noted above, other than his unsupported assertion that defendants' reasons were "multiple and conflicting," plaintiff presented no reason that defendants' reasons were not true or are unworthy of credence. *Id.* at 147. Moreover, no evidence shows that defendants made age-based comments or otherwise expressed some discriminatory animus towards plaintiff that would give rise to an inference that defendants reasons were a pretext for age discrimination. Accordingly, unlike in *Reeves*, plaintiff has failed to make even a minimal showing that defendants' articulated reasons for his termination were untrue. *Id.* at 144, 148-149.